

FILED

AUG 01 2008

PATRICK E. DUFFY, CLERK

By DEPUTY CLERK, MISSOULA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

BRENT PHILLIPS,)	CV 06-66-H-DWM-RKS
)	
Plaintiff,)	
)	
vs.)	ORDER
)	
J.T. GUINDON, RYAN DURKIN, and)	
STAN GLOVAN,)	
)	
Defendants.)	
_____)	

Plaintiff Phillips has filed an Amended Complaint under 42 U.S.C. § 1983 alleging that guards at the Montana State Prison used excessive force against him and refused to provide him medical assistance. The Defendants have filed a motion to dismiss for failure to exhaust administrative remedies.

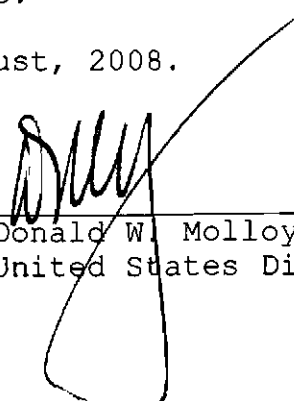
United States Magistrate Judge Keith Strong considered the motion and issued Findings and Recommendations in which he concludes that the motion should be granted and the Amended

Complaint should be dismissed. Judge Strong explains that the Defendants presented the affidavit of Kenneth R. Cozby, which states that Plaintiff Phillips failed to file an Inmate/Offender Informal Resolution Form in accordance with the prison grievance policy. Because Plaintiff Phillips did not respond to the motion to dismiss or otherwise refute the affidavit, Judge Strong recommends that the Amended Complaint be dismissed for failure to exhaust administrative remedies pursuant to 42 U.S.C. § 1997e(a).

Plaintiff Phillips did not timely object and so has waived the right to de novo review of the record. 28 U.S.C. § 636(b)(1). This Court reviews the Findings and Recommendation for clear error. McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc., 656 F.2d 1309, 1313 (9th Cir. 1981). Clear error exists if the Court is left with a "definite and firm conviction that a mistake has been committed." United States v. Syrax, 235 F.3d 422, 427 (9th Cir. 2000). I can find no clear error with Judge Strong's recommendation and therefore adopt it in full.

Accordingly, IT IS HEREBY ORDERED that the Defendants' motion to dismiss (Doc. No. 21) is GRANTED and the Complaint and Amended Complaint are DISMISSED WITHOUT PREJUDICE for failure to exhaust administrative remedies.

DATED this 1st day of August, 2008.



Donald W. Molloy, District Judge
United States District Court